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CURRENT TOPICS.

We are indebted to the United States District Judge for the Eastern District of Michigan, for a practice decision of some interest, and not heretofore reported. The case is entitled *Wolff v. Connecticut Mutual Life Ins. Co.* It arose in April, 1874, the point decided being that costs incurred in a State court prior to the removal of a case to the Circuit Court of the United States, are taxable against the losing party. The cause was commenced in Wayne Circuit Court, and after issue and one continuance in that court, was removed to the United States Circuit Court by defendant. Finally plaintiff discontinued her suit in this court, and judgment was entered against her for costs. In defendant's bill of costs were items of costs accrued in the State court before removal therefrom, amounting in the aggregate to $15, and $7 50 paid to the clerk of the State court for transcripts in making the removal. These items were objected to on behalf of plaintiff, on the ground that there was no act of Congress allowing such costs to be taxed in this court. LONGYEAR, J., said: "A suit removed from a State court comes into this court impressed with all the rights and liabilities of parties as to costs, which accrued or attached by the laws of the State while the suit remained in the State court. Acts of Congress prescribing what costs may or may not be taxed apply only to such costs as accrue after the removal has become complete and this court is invested with jurisdiction. In the State court, in case of discontinuance, the defendant would be entitled by the State laws to all his costs made up to that time, and I think this court is bound, in case of removal to this court before discontinuance, to administer those laws as to all such costs which accrued while the suit remained in the State court. No adjudicated case involving this exact question has fallen under my notice, but the cases cited below involve principles applicable to this question, and so far as they go, fully sustain the foregoing propositions. I am also informed by my brother, Judge Withey, of the Western District, that such has always been the uniform practice there. See Ellis v. Jarvis, 3 Mass. 457; Field v. Schell, 4 Blatchf., C. C. 435; Gier v. Gregg, 4 McLean, 202; Awkley v. Vilas, 2 Biss. 110. The clerk is therefore directed in this, and all like cases, to tax to the party recovering costs, all costs to which he would have been entitled under the State laws, accrued while the suit remained in the State court, and up to the time the suit was duly entered in this court." See also on this point, but against the ruling in the case at bar, Clare v. Nationa. City Bank, 4 Blatchf. 445.

IN *Jones v. Knauss*, to be reported in the next volume of Stewart's New Jersey Equity Reports, it was held by the Court of Chancery of that State that a citizen of another State who comes in to the former one voluntarily, and without a subpœna, for the purpose of giving evidence in a suit pending there, can not be arrested on a *ca. sa.* His arrest at any time while the court may require his attendance, is an invasion of its prerogative. The court distinguished the case at bar from Rogers v. Bullock, 2 Pen. 517, where it was held that a witness was not entitled to immunity from arrest unless his attendance was in obedience to a subpœna, saying:

> "The witness who claimed immunity in that case was, undoubtedly, I think, a citizen of this State, and, as such, amenable to the process of our courts. If the fact had been otherwise, it was quite too important to have escaped mention by the learned reporter, who was a member of the court which decided the case. I think it may, therefore, well be doubted whether, in a case like the present, where the witness is not bound to obey the process of the courts of this State, and whose attendance can not be compelled by compulsory means, and, if procured at all, must be voluntary, it would be held that attendance in obedience to process is necessary to immunity. An absurd purpose should not be imputed to the legislature. They certainly did not intend to deprive the suitors of this State of the testimony of witnesses residing in foreign jurisdictions; nor can it be supposed that they intended to send the writs of our courts into jurisdictions where they would be entitled to no more force than so much blank paper."

In his usual excellent manner, Mr. Stewart has collected the rulings on the subject in a lengthy note. The following cases, where the privilege recognized above has been allowed are given: Where the arrest was made at a subsequent term to which plaintiff's cause had been continued. Com. v. Huggeford, 9 Pick. 257; Smythe v. Banks, 4 Dall. 329. While a de-

fendant was returning from an appearance to a *habeas corpus* issued from a Federal court, and another *habeas corpus*, issued from a State court, was served on her. Evert's Case, 2 Disn. 33. See Rex v. Deleval, 3 Burr, 1434; Rex v. Blake, 2 Nev. & M. 312. A service of a subpœna to answer a bill in chancery on a witness attending another cause. Martin v. Ramsey, 7 Humph. 260. After one arrest and bail given thereto. Clarke v. Simpson, 1 McMull. 286; although the second arrest was in another county. Sadler v. Ray, 5 Rich. 523. While attending a reference before a master in vacation. Vincent v. Watson, 1 Rich. 194; Huddeson v. Prizer, 9 Phila. 65. While attending from another State, to hear an argument in his own case in the Court of Appeals. Pell's Case, 1 Rich. 197. While attending a suit in the Common Pleas. Harris v. Grantham, Coxe 142. After an insolvent discharge, and while returning from a session of the court, under a notice from the plaintiff. Richards v. Goodson, 2 Va. Cas. 381. While defendant was returning home from attendance on a suit. Hammerskold v. Rose, 7 Jones, 629; or coming voluntarily to attend it, Solomon v. Underhill, 1 Camp. 229; or coming to court under a subpœna, Dickerson's Case, 3 Harring. 517; or voluntarily attending from another State. Ballinger v. Elliott, 72 N. C. 596; May v. Shumway, 16 Gray 86; Thompson's Case, 122 Mass. 428; Person v. Pardee, 6 Hun. 477, 66 N. Y. 124; Juneau Bank v. McSpedan, 5 Biss. 64; Brett v. Brown, 13 Abb. P. R. (N. S.) 295. Even where both parties were non-residents. Henegar v. Spangler, 29 Ga. 217; attending a police court as a prosecutor, Montague v. Harrison, 3. C. B. (N. S.) 202; or the execution of a writ of inquiry. Walters v. Rees, 4 Moore 34. After a plaintiff's bill had been dismissed. Andrews v. Walton, 1 McN. & G. 380. Attending the registrar's office with his solicitor. to settle the terms of a decree, Newton v. Askew, 6 Hare 319; or as a witness before a registrar in bankruptcy. *Ex parte* Burt, 2 M. D. & DeG. 666. A husband of a petitioner, who ought to have been but was not a party to the cause. *Ex parte* Britten. 4 Jur. 943, 1 Mon. D. & D. 278. A bankrupt, during the forty days allowed for his examination. *Ex parte* Helsby, 1 Dea. & Ch. 16; *Ex parte* Donlevy, 7 Ves. 317; Kimball's Case. 2 Ben. 38, 2 Bank. Reg. 114. A defendant attending a master under a warrant to produce papers. Franklyn v. Colqhoun, 1 Madd. 580; Sidgier v. Birch, 9 Ves. 69. Attending a motion against him, Bromley v. Holland, 5 Vesr 2; or before an arbitrator. Moore v. Booth, 3 Ves. 350. A common councilman summoned by the mayor of the corporation to attend an election ordered by *mandamus*. Nixon v. Burt, 7 Taunt. 682. As to what constitutes an attendance: Merely being a suitor at the time of arrest is not sufficient. Gray v. Ayres, Tappan 164. A party while dining in the evening, after attending his cause all day in court, is exempt. Lightfoot v. Cameron, 2 W. Bl. 1113; Newland v. Harland, 8 Scott 70; Atty.-Gen. v. Skinners Co.. 8 Sim. 377. A plaintiff waiting in the vicinity of the court for his cause to be called. Childerston v. Barrett, 11 East, 439; Walker v. Webb, 3 Anst. 941; *Ex parte* Hurst, 1 Wash. C. C. 186. Waiting *redeundo*, in a picture-shop on the way, not an unreasonable time. Luntley v. ———, 1 Cr. & M. 579. Going into a tailor shop on his way home. Pitt v. Coombs, 3 Nev. & M. 212. During a detention of a month as a witness before a master. Brown v. McDermott, 2 Ir. Eq. 338; Burke v. Higgins, 2 Hogan 110; Gibbs v. Phillipson. 1 Russ. & M. 19. During an adjournment of the examination by the master. *Ex parte* Temple, 2 Ves. & B. 395; Spencer v. Newton, 6 Ad. & El. 623; *Ex parte* Russell, 1 Rose 278. A party going into another county to attend the taking of a deposition, in a suit pending, although he afterwards determine not to have it taken. Wetherill v. Seitzinger, 1 Miles, 237. Coming into town several days before his cause was likely to be heard. *Ex parte* Tillotson, 2 Stark. 470; Persse v. Persse, 5 H. L. Cas. 671.

COMMON LAW EXEMPTIONS.

It has been already shown[1] that the common law exemption was universal in its operation, and embraced within its limits three separate classes of articles, viz.: apparel, bedding, and tools and implements of trade.

When at last[2] a limit was placed upon the value of the exemption, it was fixed at ten pounds.

(1) *Ante* p. 2.

It will be seen that this was a liberal exemption, when it is considered how primitive and of what small value implements of trade then were, the cheaper quality of the clothing generally worn, and that the purchasing value of money was then much larger than at the present time. Expensive and complicated machinery had not then been invented, and the most of the labor performed was done by the hand of the artificer. Personal property was comparatively limited in quantity and small in value, and the limit being fixed at that amount was large enough to include all that was deemed necessary for the comfort of the debtor.

Before this time there seems to have been no limit except that fixed by the necessities of the debtor, and as many of the States adopted the common law as it stood at an earlier day, they have necessarily adopted with it the common law right of exemption as it then existed, subject to or qualified by such legislation as has since been enacted upon the subject. It becomes important, therefore, before going further, to determine as nearly as possible the scope and meaning of the word "necessary" when applied to the question of exemption, for in itself it is but a relative term merely varying in meaning with its use.

It is not to be expected that any exact limit can be found for the word, and none can be found, but something can be shown of the construction which the legislatures have intended to place upon it, as understood and declared by the courts.

In Vermont, under a statute exempting "such suitable apparel, bedding, etc., and articles of household furniture as may be nenessary for upholding life," a "brass timepiece" was held[3] to be included, the court saying: "The word 'necessary,' or 'necessaries' has ever been considered, in legal language, to extend to things suitable to the situation of the person in society, and is not confined to things absolutely necessary for mere subsistence."

In a later case[4] in the same State it was said "the term 'necessaries' means that which is convenient or useful—which a man procures for his own personal use, unless extravagant;"

(2) 32 Geo. III.
(3) Leavitt v. Metcalf, 2 Vt. 342.
(4) Garrett v. Patchin, 29 Vt. 248.

and in a still later case[5] a piano was excluded, it being "not an article of mere comfort, and does not minister to a want universally felt."

In Connecticut, in an early case,[6] the court in discussing the difference between necessities and luxuries declares that it depends in every case upon the peculiar circumstances of the case. And the same court, in a later case,[7] say that in determining this question, "we may pass beyond what is strictly indispensable, and include articles which, to the common understanding, suggest ideas of comfort and convenience. But having done this the obligation is upon us to exclude all superfluities and articles of luxury and ornament."

In Massachusetts, it has been held[8] that "articles may be of that plain and cheap character which, while not indispensable, are to be regarded *amongst the necessaries* of life as contra-distinguished from luxuries."

There are numerous other cases[9] to the same effect, all bearing toward the one general purpose of giving a liberal construction to the word as applied to exemptions.

With the assistance of these decisions as to the meaning and scope of the word, it becomes easy to determine the policy of the law and so makes less difficult the application to particular cases.

Having now an understanding as to the limits of the right, and generally as to the extent of the benefit intended, the next natural subject of inquiry is as to the definition and extent of meaning belonging, in this connection, to the three specified classes of exempt articles, viz.: apparel, bedding, and tools and implements or utensils of trade.

The meaning of the first of these words—"apparel," was carefully considered by Hammond, J., in a case recently decided by him in the U. S. District Court for the Western District of Tennessee.[10] The question arising in the case was whether "a plain, old style, single-case gold watch which he has owned for twenty-five years or more, and which

(5) Dunlap v. Edgerton, 30 Vt. 224.
(6) Montague v. Richardson, 24 Conn. 338.
(7) Hitchcock v. Holmes, 43 Conn. 528.
(8) Davlin v. Stone, 4 Cush 359.
(9) Peverly v. Sales, 10 N. H. 356; *In re* Thiel, 4 Biss. 241; Harrisson v. Mitchell, 13 La. Ann. 260; Wilson v. Ellis, 1 Den. 462; *In re* Steele 8 Cent. L. J. 86; Freeman on Ex. § 231; Haswell v. Parsons, 15 Cal. 266; Howard v. Williams, 2 Pick. 80; Casewell v. Keith, 12 Gray 351.
(10) *In re* Steele, 8 Cent. L. J. 86.

would scarcely sell for twenty-five dollars," could be held exempt by a bankrupt under the law exempting "other articles and necessaries" and "wearing apparel." In discussing the question, the learned judge says: "It would not be doing any great violence to the meaning of the term 'wearing apparel,' as used in the bankrupt act, to include in it a gold watch of moderate value. The definition of the word 'apparel,' as given by lexicographers, is not confined to clothing; the idea of ornamentation seems to be a rather prominent element in the word, and it is not improper to say that a man 'wears' a watch or 'wears' a cane. The exemption law of Arkansas says that 'wearing apparel, except watches, shall be exempt.' Ark. Dig. 503–4; James' B'k'cy 58; Avery & Hobbs, Bank'y. 68." The question whether a watch is a necessary article of apparel and exempt as such, seems to depend upon the value of the watch itself, and also upon the business and condition of the debtor, and under different circumstances has been differently decided,[11] the question being apparently as to the necessity rather than as to the character of the article.[12] This much at at least appears certain, that the word apparel, to quote the words of Hammond, J., *supra*, "is not confined to clothing." This conclusion also accords more nearly with that suggested by the derivation of the word,[13] which indicates such a complete equipment as one's station requires, rather than the mere necessary covering for the body. And the courts favoring this broader construction of the word have held[14] that cloth sent to the tailor to be made into clothing, was in that form exempt as "apparel," as they have also held[15] that cloth in process of manufacture was exempt as "manufactured cloth." The word "apparel" qualified by the word "necessary" was considered in an early New Hampshire case,[16] under a statute which exempted "wearing apparel necessary for immediate use," and it was held that an overcoat and a suit "to go to meeting in," were included, the court saying: "The wearing apparel 'necessary for immediate use' must be such an amount of clothing as is necessary to meet the varying climate and the customary habits and ordinary necessities of the mass of the people. The clothing worn by the individual while about his daily toil, might be all that was necessary for the time, but be wholly insufficient when the labor ceased, and the clothing suitable and proper for days of labor might not be such as the common sentiment of the community would deem necessary for use on days set apart for religious assembling and worship."

The decisions relating to the second class of exempt articles are less numerous than those relating to the other two, but there are enough to show the construction to be given it. In the case of Haswell v. Parsons,[17] under a statute exempting "necessary household furniture," the debtor, whose family consisted of a wife and three children, claimed as exempt six or seven beds of small value, and the claim was allowed, the court saying, "It may be possible that a less number of beds would have accommodated the plaintiff, his wife and children, but it would be a very narrow construction of the statute to limit the exemption to the number required for immediate and constant use." And in a case decided in Connecticut in 1874,[18] the court say: "One may keep one bed for herself, one for her daughter, a spare bed for visitors, and one for a servant or nurse in case of sickness," and this under a statute exempting "necessary furniture."

The third and last class of articles has been frequently before the courts for judicial construction, and though the decisions are not altogether in harmony, owing mainly to verbal differences in the statutes of the several States, they generally accord as to the purpose and extent of the terms used in defining it.

The definition given by the Supreme Court of New Hampshire of the phrase "tools of a mechanic" is that it "is presumed to embrace such implements of husbandry or of manual labor as are usually employed in, and are appropriate to, the business of the several trades or classes of the laboring community, and ac-

(11) *Pro. In re* Thiel, 4 Biss. 241; Mack v. Parks, 8 Gray 517; Wilson v. Ellis, 1 Den. 462; Leavitt v. Metcalf, 2 Vt. 342; Bumpus v. Maynard, 38 Barb. 626; *Con.* Smith v. Rogers, 16 Ga. 479; *In re* Graham, 2 Biss. 449; *In re* Cobb, 1 N. B. R. 448.

(12) *Con.* Herm. Ex. § 99.

(13) Lat. *appario*, noun *apparatus*; Fr. *appareil*.

(14) Ordway v. Wilbur, 16 Me. 263; Richardson v. Buswell, 10 Met. 506.

(15) Sims v. Reed, 12 B. Mon. 51.

(16) Peverly v. Sayler, 10 N. H. 356.

(17) 15 Cal. 266. See also Dickerman v. Van Tyne, 4 Sandf. 724.

(18) Weed v. Dayton, 13 Am. L. Reg. 603.

cording to the wants of their respective employments or professions."[19] As qualified by the phrase "of a mechanic," this definition is quite in harmony with the current of authorities,[20] while the word "tools," if unqualified, would easily bear a correspondingly broader meaning.

In Vermont[21] the word "tools" is applied to all farm implements for mere manual use, but not to such as are used with horses and oxen, as reapers, etc, but as this would exclude the plow, than which no implement is more necessary, the distinction seems to be inaccurate. The words of the Iowa statute are "tools or instruments," and the Supreme Court lay down the rule in these words: "Is the instrument a proper tool for a farmer to cultivate his land with? If so it is exempt."[22] In Kansas a reaper and mower is exempt as a "farming utensil."[23] Among articles which have been held exempt under statutes exempting "tools and implements of trade" are a merchant's iron safe,[24] a weaver's loom,[25] printing types and presses,[26] a barber's chair and foot rest,[27] a surgeon's instruments,[28] a dentist's intruments,[29] a jeweler's lamp[30] and a musician's instruments,[31] while as not coming within the definition, the courts have excluded a threshing machine,[32] a farmer's horse,[33] a building used as a photograph gallery,[34] types and forms of an extensive printing establishment,[35] and, as not being the "tools of a mechanic," a dentist's instruments,[36] and a lawyer's library.[37] The question as to whether a professional man's instruments and library are "tools and implements of trade," has arisen frequently, and where the spirit of the law has been allowed to govern, or where the statute has not excluded them therefrom, they have been so held. In reason they cannot be excluded. Blackstone[38] expressely includes "the books of a scholar" with "the axe of a carpenter" to illustrate the meaning of the phrase "tools and utensils of trade." They certainly are not less necessary, and the opinion that excludes them as not falling within the letter of the law, sticks in the bark.

It will be seen from the authorities cited that the difference between necessary or ordinary implements and expensive and unusual ones is clearly recognized in the exemption laws whether statutory or at common law. Machinery is generally excluded, but not merely because it is costly or complicated, but because it is either not the implement of a trade, but rather the appurtenance of a factory,[39] or because the same labor could be readily performed with simpler and equally effective implements already exempt. This distinction would clearly not apply in cases where less costly substitutes could not be obtained, as to the lawyer's library, whose profession cannot be reasonably well exercised without the possession of at least the statutes, digests and reports of his own State.

Another qualification of the right of exemption is that the tools and implements to be exempt, must be of that trade or profession of the debtor by means of which he obtains his livelihood,[40] and reasonable in amount for that purpose.[41] Bearing in mind the purpose of the law, and aided by these decisions illustrating it, it becomes a matter of but little difficulty to apply the rule to every individual case, whether arising under the statute or common law, giving the creditor his due yet always leaving to the debtor enough so as not

(19) Wilkinson v. Alley, 45 N. H. 551.
(20) Seeley v. Gwillien, 19 Conn. 518; Knox v. Chadburne, 28 Me. 160; Grymes v. Bryne, 2 Minn. 89; Herm. on Ex. § 104; Freem. on Ex. § 226.
(21) Garrett v. Patchin, 29 Vt. 248.
(22) Meyer v. Meyer, 23 Iowa, 359.
(23) Voorhees v. Paterson, 7 Cent. L. J. 275.
(24) Harrison v. Mitchell, 13 La. Ann. 260.
(25) McDowell v. Shotwell, 2 Whart. 26.
(26) Patten v. Smith, 4 Conn. 450; 9 Cent. L. J. 122; Sallee v. Waters, 17 N. C. 482.
(27) Allen v. Thompson, 45 Vt. 472.
(28) Robinson's Case, 3 Abb. Pr. 466.
(29) Maxon v. Perrott, 17 Mich. 332; Duperrow v. Commeny, 6 La. Ann. 789.
(30) Bequillard v. Bartlett (Kan.) 6 Cent. L. J. 119.
(31) Goddard v. Chaffre, 2 Allen 394; Baker v. Willes, 5 Cent. L. J. 330.
(32) Meyer v. Meyer, 23 Iowa, 359; Ford v Johnson, 34 Barb. 364.
(33) Wallace v. Collins, 5 Ark. 41.
(34) Holden v. Stranahan, 6 Cent. L. J. 415.
(35) Danforth v. Woodward, 10 Pick. 423; Buckingham v. Billings, 13 Mass. 82; Richie v. McCawley, 4 Pa. St. 472.
(36) Whitcomb v. Reid, 31 Miss. 567.
(37) Lenoir v. Weeks, 20 Ga. 596.
(38) 3 Bl. Com. 9.
(39) Danforth v. Woodward, 10 Pick. 423; Knox v. Chadbourne, 28 Me. 160; Atwood v. DeForest, 10 Conn. 513-515.
(40) Abercrombie v. Alderson, 9 Ala. 981; Grymes v. Beyers, *supra*; Washburn v. Goodheart, 7 Cent. L. J. 248.
(41) Richie v. McCawley, 4 Pa. St. 472; Seeley v. Gurilen, 40 Conn. 106; Atwood v. DeForrest, 19 Id. 513; Prather v. Bobo, 15 La. Ann. 524; Harris v. Haynes, 30 Mich. 140; Norris v. Hoyt, 18 N. H. 196; Davis v. Wood, 7 Mo. 162; Wallace v. Collins, 5. Ark. 41.

to disable him "from serving the Commonwealth in his station."[42]

W. L. S.

(42) 3 Bl. Com. 9; Howard v. Williams, 2 Pick. 80.

SURETYSHIP — FAILURE TO NOTIFY BONDSMEN OF PREVIOUS MISCONDUCT OF OFFICIAL.

ROPER v. TRUSTEES OF SANGAMON LODGE.

Supreme Court of Illinois.

[Filed at Springfield, June 20, 1879.]

In a suit on the bond of a lodge treasurer for moneys collected and not paid over, it is no defense on the part of the bondsmen that, at the time of their signing the bond, the treasurer was a defaulter to the lodge for moneys previously received; that they were not members of the lodge, and did not know of the fact of the default; that the officers of the lodge did know of the fact and failed, as was their duty, to notify the bondsmen, and that they were misled by the lodge having selected him and thereby induced them to believe he had acted faithfully.

WALKER, J., delivered the opinion of the court.

It appears that John A. Hughes was elected Treasurer of appellee's lodge. He so acted from the first day of January, 1875, until the 30th of June following. It is agreed by the parties that at the commencement of this term of office he reported to the lodge that he had the sum of $436 money of the lodge; that on the 30th of June, the end of his term, he should have had in his hands $561, which he had received and failed to pay over to his successor. The suit was on the bond and service was had on the sureties but not on Hughes.

The sureties pleaded *non est factum* and a special plea; that for two terms preceding the term commencing on the first of January, 1875, Hughes, the principal, was treasurer, and at that time was a defaulter to the lodge for moneys previously received and misapplied; that it was then known to the officers and members of the lodge that he was a defaulter and the sureties were ignorant of the fact; that the lodge is a secret organization of which defendants were not members and were ignorant of its business; that it was the duty of the officers and members of the lodge when the bond was executed to inform defendants that Hughes was a defaulter, and they were mislead by the lodge having re-elected him and thereby induced them to believe he had acted faithfully; but the officers or members gave to defendants no such notice. And the plea concluded by insisting the bond is void. The court sustained a demurrer to this plea and that decision is assigned for error. And it is also urged that the court erred in refusing to permit appellants to prove that the default occured and the misappropriation of the money was during the term previous to his election on the first day of January, 1875, when other persons were his sureties, for the purpose of fixing the liability for the default on the sureties in the bond covering the previous term.

It is urged that the special plea presented a complete defense to the action; that the officers and members of the lodge knowing of the defalcation and re-electing Hughes treasurer, operated as a recommendation of his honesty to all persons not members of the lodge; that such conduct on the part of the lodge was calculated to and did mislead appellants and operated as a fraud upon them; and the concealment by the officers and members of the fact that Hughes was a defaulter, when they signed his bond, was a positive fraud.

There is a class of cases in which it is held, that it is fraud to fail to disclose defects on the sale of property; and to silently stand by and permit another to act upon the supposition that he is purchasing a good title when the person claiming an adverse title or interest, knowing the fact and having the opportunity, fails to assert his claim. So, of many other transactions, it is held to be a fraud to fail to disclose facts that would prevent the other party from acting. But the rule does not apply when the defect or important information is as accessible to one person as the other. One person is not required to act as the agent of another when the other by reasonable diligence may acquire the information.

If a person knowing another to be utterly insolvent proposed to credit him if he would procure sureties, he can not be held to have acted in bad faith by failing to apprise the surety that his principal is utterly insolvent. We presume no one would regard such a failure to apprise the surety of the fact of the insolvency of the principal as a fraud, and yet had the surety known the fact, he would probably not have indorsed for the principal. And this is held not to be a fraud because it was the folly of the surety not to have learned the financial standing of the principal. The avenues of information were opened to him and it was his duty to have used the means to inform himself; and failing to do so, he must suffer the consequences of his inaction. In such a case however, if the person extending the credit were to use any artifice to throw the surety off of his guard and to lull him into a false security and he was thereby deceived, that would amount to a fraud. But mere failure to communicate the fact in such a case does not amount to bad faith.

In this case it is urged that as this was a secret organization, information as to Hughes' integrity was not accessible to appellants, as they were not members of the order. We apprehend that Hughes' account books were not under the seal of secrecy. If appellants had requested, he could, if disposed, have shown his books to them. Or had they inquired of the officers of the lodge or even of its members, they would, if within their knowledge, have been required to communicate correct information. It is thus apparent that the sources of information were open to appellants, had they been disposed to pursue them. But the officers and members were asked nothing, nor did

they say anything, and we cannot hold they were guilty of a fraud.

It is likewise urged that the court should have admitted evidence to prove that the defalcation occured the term before appellants became sureties on the bond, and thus show that the sureties on his bond for the preceding term were liable. In the case of Morley v. The Town of Metamora, 78 Ill. 395, the same defense was interposed. In that case, as in this, the supervisor was his own successor and his sureties interposed the same defense, but it was held not to be good. In that case it was said: "It is not made to appear very clearly that whatever default occurred took place in the first year the supervisor was in office; but conceding that fact we do not think it relieves the sureties on the bond upon which this action is brought, from liability. The supervisor was his own successor in office. He had made his annual report in which he charged himself with having a certain amount of money in his hands. The report was approved and we must presume it was true. * * * In contemplation of law the money mentioned in his report was in the hands of the supervisor and the undertaking of the sureties on his bond was that he should account for it. It was as much his duty to account for whatever funds were in his hands at the end of the first year as it was to account for whatever should be received during the second year. The law made the sureties responsible for any default in that regard. There could be no action maintained against the sureties on the first bond, at the expiration of that year, for there was no one who could make demand for the money the supervisor reported as having in his hands so as to establish a default." And the case of Pinkstaff v. People, 59 Ill. 148, is referred to as sustaining the decision in that case.

We think the case of Morley v. Metamora *supra* is decisive of this question. We are unable to distinguish this from that in any essential particular. Appellants undertook that Hughes should account for and pay the money on orders from proper authorities when required, and this he failed to do, and appellants must make his default good. We perceive no error in the record and the judgment must be affirmed.

INSURANCE — RELATION OF PARTIES INSURED, RE-INSURED AND RE-INSURING —JUDGMENT AGAINST RE-INSURED—ESTOPPEL OF RE-INSURER.

GANTT v. AMERICAN INSURANCE CO.

Supreme Court of Missouri.

[Filed March 10, 1879.]

1. INSURANCE—RELATIONS OF INSURED, RE-INSURED AND RE-INSURERS.—A contract of re-insurance creates no privity between the re-insurer and the original insured. The re-insured, to maintain his action against the re-insurer, is not obliged to show that he has paid the loss, but may at once bring suit, to which the re-insurer may make the same defense which the re-insured can make against the original assured, or the former may await a suit by the latter and give notice of it to the re-insurer, and on being subject to damages, recover them, together with the costs and expenses of the litigation from the re-insurer.

2. NOTICE OF SUIT TO RE-INSURER—JUDGMENT AGAINST RE-INSURED.—Where, after notice of suit threatened or begun against the re-insured, the re-insurers do not disapprove of its contestation by the re-insured, the latter shall be deemed to have been required by the re-insurers to defend the same; and such defense when made in good faith, will render any judgment obtained by the original insured binding on the re-insurers as to all matters which could have been litigated, and make them liable for the costs and expenses of the litigation. This can not be affected by a contract entered into between the re-insured and the re-insurers, in which neither were bound to do any thing more than the law already required of them.

3. SATISFACTION OF JUDGMENT IN A PARTICULAR WAY—VALID DEFENSE BY RE-INSURED — ESTOPPEL.—A contract was made between the original insured and the re-insured, wherein for a consideration paid it the former released the latter from all liability on any judgment, if any should be recovered against it. And in case of such recovery, the re-assured was to assign its claims of re-insurance on the re-insurer to the original insured, which assignments were to be received in full satisfaction of said judgment against the re-insured. The contract further provided that nothing contained in it should hinder or prevent the re-insured from defending the suit against it by the original insured. *Held*, that such contract simply provided for the satisfaction in a particular way of the judgment that might be recovered, and did not disable the re-insured from making a genuine and honest defense in the suit against it; therefore, the re-insured having offered to show that such a defense was made, which testimony was excluded at the instance of the re-insurers, and it further appearing that the latter had notice of the contract before the trial and interposed no defense for themselves, they are estopped to deny the good faith of the defense, and are bound by the result of the former suit.

4. MEASURE OF DAMAGES BETWEEN RE-INSURED AND RE-INSURER.—Where a loss occurrs on a policy of re-insurance, the liability of the re-insurer is not contingent on the amount paid by the re-insured, nor upon any payment whatever by him, but he is liable for all that the re-insured becomes liable to pay by reason of such loss.

Appeal from the St. Louis Court of Appeals.

In December, 1863, the defendant, then called the Atlantic Insurance Company, by its policy of insurance issued to the United States Insurance Company, re-insured, "lost or not lost," any insurance the latter company might have, including re-insurance on any seaworthy boat to or from all points below St. Louis in all rivers, against the usual maritime risks, including fire, the said re-insurance not to exceed the sum of $20,000 and to cover the sixth-twentieth thousand dollars on any one boat, the amount of loss to be paid within sixty days after proof of loss.

In June, 1864, the United States Insurance Co. insured Hening & Woodruff to the amount of $120,000 on a shipment of 700 bales of cotton, valued at $280,000, on a steamer making a voyage

from the Red River to Cairo, against fire and other risks. The steamer and the cotton were burned on the voyage.

On September 24, 1872, judgment was obtained in the United States Circuit Court for the Eastern District of Missouri for $178,280, being the amount of insurance and interest thereon, by Hening & Woodruff against the United States Insurance Company.

The plaintiffs, as assignees of the policy of insurance issued by defendant, instituted the present suit to recover one-sixth of the judgment in the United States Circuit Court including the attorney's fees and all other costs.

The defendant, among other things, set up in its answer that the judgment in the United States Circuit Court was collusive and fraudulent and therefore not conclusive on it, and to sustain this defense set out a contract of July 18, 1864, signed by the defendant and the other reinsuring companies, in which, after reciting the claim of Heuing & Woodruff against the United States Insurance Company for the insurance on the cotton and the liability of each of the re-insuring companies to the United States Insurance Company to the amount of $20,000 each, and the belief by all the companies that the claim was illegal and unjust and the desire that the same should be defended, it was agreed with the United States Insurance Company that it should employ for its defense such counsel as it saw proper, and if it was successful therein that the reinsuring companies should pay their *pro rata* proportion of the attorney's fees and costs, and in case the United States Insurance Company should fail in its defense, then each of the re-insuring companies should pay their *pro rata* proportion of the judgment and of the attorney's fees and costs.

The defendant further set out that under said agreement it paid its proportion of fees, etc., up to February 21, 1872, and that up to that time and until the making the contract of July 24, 1872, the United States Insurance Company defended against the claim in good faith and successfully, but that on said July 24, 1872, without the consent of the defendant, and in fraud of its rights, a contract was entered into between the United States Insurance Company and Hening & Pearce, surviving partners of Hening & Woodruff, in which it was agreed that in consideration of the payment to Hening & Pearce by the United States Insurance Company of $22,000 and the assignment of a certain claim of the Insurance Company for other cotton, Hening & Pearce bound themselves to release the United States Insurance Company from any judgment which might be recovered in the United States Circuit Court, or in any suit or proceeding which might ever be had on said claim, or any part of it, and it was further provided that if any judgment was ever recovered on said claim, then the United States Insurance Company would assign and transfer to Hening & Pearce its claims and demands on the defendant and other re-insuring companies for the re-insurance claimed by the United States Insurance Company, which assignments were to be received in full satisfaction of any judgment against the United States Insurance Company, said assignments to be without any recourse on said company, and the said Hening & Pearce were to pursue any remedy on the re-insuring companies they might elect, with the privilege of using the name of the United States Insurance Company at their cost. It was further provided that nothing in the agreement should hinder or prevent the United States Insurance Company from defending or continuing fully and in all things to defend the suit against it in the United States Circuit Court, or any suit or proceeding on account of the claim, and in case the suit was defeated and no recovery was had therein, Hening & Pearce were to keep the $22,000 and the other claims assigned, and were not to refund or repay the same.

Verdict and judgment were rendered for the plaintiffs which was appealed to the Court of Appeals, and there affirmed.

George A. Madill, *Alexander Martin* and *John H. Rankin*, for appellant.

George P. Strong and *Thomas T. Gantt*, for respondents.

HOUGH, J., delivered the opinion of the court:

It is urged by the defendant that the contract of July 18, 1864, altered the relations of the re-assured and re-insurers, as they existed under the policies of re-insurance and irrevocably committed to the United States Insurance Company, the defense of the suit brought by Hening and Woodruff against it in the Circuit Court of the United States and made said company a trustee as to the policies of re-insurance held by it; that the contract of July 24, 1872, by which it stipulated for the assignment of said policies in satisfaction of any judgment which might be recovered against it, rendered said company incapable of further conducting such defense; that it was a fraud in law upon the rights of the defendant; that the cause was legally settled at the time it was tried, and the judgment obtained therein a collusive one and not binding upon the defendant. As much of the argument of counsel has been directed to a consideration of the legal effect of the contract of July 18, 1864, it may be well to briefly advert to the nature of the duties and obligations arising out of the relation of insurer and re-insurer which existed between the United States Insurance Company and the defendant at the time the contract was entered into.

A contract of re-insurance creates no privity between the re-insurer and the original assured. Herckenrath v. American Mut. Ins. Co., 3 Barb. Chy. 63. The re-assured is not obliged in order to maintain his action against his re-insurer to show that he has paid his loss. He may at once resort to his action against the re-insurer and to such action the re-insurer may make the same defense which the re-assured could make against the original assured; or the re-assured may await a suit by the first assured, give notice of it to his re-insurer, and, on being subjected to damages, recover them together with the costs and expenses of the litigation against their re-insurers. Strong v. Phœnix Ins. Co., 62 Mo. 289; Eagle Ins. Co. v. Lafayette Ins. Co., 9 Ind. 443; Hone v.

Mutual Ins. Co., 1 Sandf. 137. In the case of New York Marine Ins. Co., v. Protection Ins. Co., 1 Story C. C. 458, Judge Story, in commenting upon the relation sustained by the re-insurers to the re-insured said, "If notice of a suit threatened or pending upon the original policy be given to the re-assurers, they have a fair opportunity to exercise an election whether to contest or admit the claim. It is their duty to act upon such notice, when given within a reasonable time. If they do not disapprove of the contestation of the suit, or authorize the party re-assured to compromise or settle it, they must be deemed to require that it should be carried on; and then, by just implication, they are held to indemnify the party re-assured against the costs and expenses necessarily and reasonably incurred in defending the suit." In the case of Strong v. The Phœnix Ins. Co., 62 Mo. 299, in commenting upon the foregoing observations of Judge Story, this court said: "If a *bona fide* judgment is rendered against the original insurer and he has contested the matter in good faith for the protection of the re-insurer and the latter is bound to pay the costs and expenses incurred for his benefit, why is he no tequally bound by the judgment? It would be a singular position to take, to say that the re-insurer was bound by the incident and not by the principal. The contest is carried on by his consent or acquiescence and for his benefit and protection, and if good faith is observed can there be any reason why the identical question should be litigated twice? The re-assured and the re-insurer stand in the precise relation of all other parties, and the result of one litigation binds or concludes both." It will thus be seen that in all cases where the re-insurers do not after notice of suit threatened or begun on the original policy disapprove the contestation thereof, the re-assured shall thereby be deemed to have been required by them to defend the same, and such defense, when made in good faith for the protection of the re-insurers, will render any judgment obtained by the original assured in such suit, binding upon the re-insurers, as to all matters which could have been litigated therein and make them liable also for the costs and the expenses of the litigation. It necessarily follows that in all cases where the re-insurers fail, after notice to participate in the defense, the original insurer, by operation of law, becomes *sub modo* their agent for the management of such defense, and in the conduct thereof is bound to exercise the utmost good faith, and any judgment against him collusively obtained would not support a recovery over against the re-insurers. Such being the relations which the law established between the re-assured and the re-insurers at the time the contract of July 18, 1864, was entered into, let us examine the terms of that contract and see wherein it varied their respective duties and obligations. The contract begins by reciting the claim of Hening & Woodruff against the United States Insurance Company for the sum of $120,000 for cotton burned on the 9th of June, 1864; also an existing liability on the part of the defendant and other companies to the United States Insurance Company as re-insurers of that company, the belief of all the said companies that the claim preferred was illegal and unjust, and a desire that it should be resisted. And in consideration thereof it was agreed that the United States Insurance Company should employ such counsel as it saw proper to manage the defense, and in the event it should succeed in such defense, the re-insurers agreed to pay their *pro rata* proportion of the attorneys' fees and costs, and in the event the United States Insurance Company should fail in said defense, they agreed to pay their *pro rata* proportion of the judgment, attorneys' fees and costs.

It is perfectly plain that under the contract the United States Insurance Company undertook no duty which the law would not have imposed upon it, *under the circumstances recited in the preamble*, if the foregoing contract had never been made. In the absence of any such agreement, it would, under the circumstances, have been its duty to employ counsel and to have made a faithful defense. It is equally plain that the defendant incurred no obligation which the law did not impose upon it, as re-insurer, saving and excepting the stipulation to pay its share of the expenses of the suit, in the event the defense was a successful one, for it was already bound to pay its proportion of any judgment which should be fairly obtained against the United States Insurance Company, together with its share of the expenses. Such liability was one of the existing facts recited in the preamble. With the exception noted, therefore, this contract is nothing more than a recital of the then existing condition of things and an enduring memorial thereof. This contract does not in any particular supersede the contracts of re-insurance but simply recognizes the duties and obligations flowing from the policies and arising out of the circumstances of the case. The additional obligation assumed by the re-insurers in respect to the fees of counsel was supplemental in its nature and did not in any way affect the policies. It could as well have been entered into by itself on a simple notice to defend, and in such it is plain that the policies would have remained unaffected. If the re-insurers under the circumstances recited in the contract had entered into no agreement with the United States Insurance Company for the defense of the suit, the defense thereof would have been as fully committed to that company as it was by the terms of the contract. But it is very clear that in such case the re-insurers would not by their silence or inaction have irrevocably committed such defense to the re-assured. A failure to come in, in the beginning, would have constituted no abandonment of their right to defend. At any time during the progress of the cause, they would have been entitled as parties who were to be bound by the judgment, to interfere for the protection of their own interests. So under the contract the defense of the suit was committed to the United States Insurance Company, but not irrevocably so. There was no stipulation for the exclusive right to defend the suit, nor was there any consideration for such a grant of authority. The United States Insurance Com-

pany gave nothing, promised nothing, for the exclusive and irrevocable power and authority to defend against the claim of Hening & Woodruff; and we are strongly inclined to the opinion that after the agreement to make common cause in the defense of the suit, and the stipulation that the United States Insurance Company should employ the attorneys and the re-insurers should share the expense of their employment, the attorneys employed represented the re-insurers as well as the re-insured. They were then as fairly identified with the cause as it was possible for them to be; as much so as if they had themselves employed the attorneys and the United States Insurance Company had under an agreement to that effect contributed its share of the expense. If this view be correct it is quite evident that the re-insurers are conclusively bound by the judgment rendered against the United States Insurance Company notwithstanding the agreement of July, 1864.

But conceding that the attorneys employed under the agreement of July 18, 1864, were not the attorneys of the re-insurers and did not represent them, but were the attorneys solely of the United States Insurance Company, the re-insurers were clearly at liberty to participate in the defense of the suit whenever they felt it to be their interest to do so, notwithstanding the contract of 1864. The United States Insurance Company was at most the agents only of the re-insurers to make defense for them so far as their interests were concerned, and a permanent pecuniary interest in the result of the litigation on the part of said company was not essential to the creation or continued existence of such agency. Such agency might with equal propriety have been created and continued until the close of the litigation, although the United States Insurance Company had re-insured its entire risk. The creation of the agency; conceding it to be such—and this is the most that can reasonably be claimed by the defendant—was undoubtedly founded on the trust and confidence reposed by the re-insurers in the purpose and undertaking of the United States Insurance Company to honestly and in good faith defend the suit, and the real inquiry at last is whether such defense was made or whether the trust was disappointed and the confidence abused. And this brings us to the consideration of the nature and effect of the contract of July 24, 1872, which contract the defendant contends disabled the United States Insurance Company from making a genuine defense. This contract has been denominated a "contract of settlement," and declared by the counsel of the defendant to be a settlement of *the controversy* involved in the litigation between Hening & Woodruff and the United States Insurance Co. This we think is an erroneous view of that contract. The contract did not settle the controversy; that was left to be settled by an actual trial of the suit pending in the Circuit Court of the United States. The contract simply provided for the satisfaction in a designated way of any judgment that might be recovered against the insurance company. This could be done and still the suit could be fairly and honestly defended. This is no unusual thing in litigation. Parties not unfrequently agree that in the event of a recovery, the judgment shall be satisfied in a particular way. No duty, the performance of which the re-insurers had a right to demand of the United States Insurance Company, was required to be violated or neglected by the terms of this contract. It created no conflict between the duties of the United States Insurance Company and its interest. No right of the re-insurers was bartered away. All the re-insurers had a right to demand of the United States Ins. Co., was an honest defense, and this contract did not disable them from making such a defense. It was not essential in order to make such defense that it should have a substantial interest in the controversy. For if that be so and an insurer re-insures his entire risk, and the re-insurers fail to come in and defend after notice to do so, no judgment can be obtained which would be binding on the re-insurers. The validity of the judgment for the purposes of a recovery over, does not depend on the absolute interest of the original insurer, but upon the fact that the suit against him has been honorably and fairly defended. Plaintiffs offered to show that such a defense was made by the eminent counsel who defended the original suit, notwithstanding the contract of July 24th, 1872, but the testimony was excluded at the instance of the defendant. Furthermore, it clearly appears that for about a month before the trial of said cause, the defendant was fully aware of the existence of the contract of July, 1872, extinguishing the substantial interest of the United States Insurance Company in the controversy then pending in the United States Court, and having taken no steps to interpose a defense for itself or to prevent any further defense of said cause by said company, it is not now at liberty to deny its capacity to make such defense. Disqualified to make a defense it certainly was not, but if the defendant felt that all inducement to a vigorous and faithful defense was destroyed by reason of the diversities of its interest in the subject matter of the controversy, and it did not wish to risk the issue of the trial under such circumstances, as a party who was to be bound by the judgment, it certainly had the right to bring that fact to the attention of the United States Court, and to assume the control of the litigation for the control of its own interests. Having failed to do so, it must be considered as having acquiesced in the right of the United States Insurance Company to make the defense, and in the absence of all testimony of any fraud or want of good faith on the part of the said company, or its attorneys in making such defense, it must be held bound by the result of the suit. And this view of the case is substantially presented by the second and fourth instructions asked by the defendant. We agree with the Court of Appeals in thinking that the case was tried on a theory prejudicial to the rights of the plaintiffs, and that no material error was committed against the defendant. We see no error in the rule adopted by the Circuit Court as to the measure of damages. The extent of the liability of the re-insurer is not contingent upon the amount paid by the re-assured,

nor upon any payment whatever by him. When a loss occurs which is covered by the policy of re-insurance, the re-insured is entitled to recover from the re-insurer, not what he has paid, but all that he has become liable to pay by reason of such loss. This is a necessary consequence of the rule that the re-assured may maintain an action against the re-insurer without showing that he has paid the loss. Strong v. Phœnix Ins. Co., 62 Mo., 289; Hone v. Mutual Safety Ins. Co., 1 Sandf. 137; N. Y. State Marine Ins. Co. v. Protection Ins. Co., 1 Story, C. C. 458; Eagle Ins. Co. v. Lafayette Ins. Co., 9 Ind. 443; Blackstone v. Allemania Fire Ins. Co., 56 N. Y. 104; Herckenrath v. American Mut. Ins. Co., 3 Barb. 63; Darrington v. Com. F. & M. Ins. Co., 1. Bosw. 152. We are, therefore, of the opinion that the judgment of the Court of Appeals should be affirmed. All concur.

CONTRACT — OFFER BY LETTER — WHEN CONTRACT COMPLETE.

HOUSEHOLD, ETC. INS. CO. v. GRANT.

English Court of Appeal, July, 1879.

When an offer is made by letter, which expressly or impliedly authorizes the sending of an acceptance of such offer by post, and a letter of acceptance properly addressed is posted in due time: *Held*, that a complete contract is made when the letter of acceptance is posted, though such letter is never delivered to the person to whom it is addressed.

This was an appeal from a judgment of Mr. Justice Lopes (reported 9 Cent. L. J. 89), in favor of the plaintiffs, in an action for calls on certain shares in the plaintiffs' company.

In September, 1874, the defendant applied by letter for shares in the plaintiffs' company, and the secretary of the company replied by letter allotting certain shares to him. The secretary's letter containing the notice of allotment was duly addressed and posted, but never reached the defendant. In March, 1877, a notice of a call on the shares allotted was sent to the defendant, with a request for payment. The defendant refused to pay the call, and contended that, as he had never received an answer to his application for shares, there was no contract, and he was not liable.

Lopes, J., ruled that the contract between the parties was completed when the letter of the secretary of the plaintiffs' company containing the notice of allotment was posted, though that letter had never been received by the defendant.

Finlay and *Dillwyn*, for the defendant; *Harrison, Q.C.*, *Wilberforce* and *Arbuthnot*, for the plaintiffs.

Cur. adv. vult.

THESIGER, L. J.

In this case the defendant made an application for shares in the plaintiffs' company under circumstances from which we must imply that he authorized the company, in the event of their allotting to him the shares applied for, to send the notice of allotment by post. The company did allot him the shares, and duly addressed to him and posted a letter containing the notice of allotment; but upon the finding of the jury it must be taken that the letter never reached its destination. In this state of circumstances Mr. Justice Lopes has decided that the defendant is liable as a shareholder. He based his decision mainly upon the ground that the point for his consideration was covered by authority binding upon him, and I am of opinion that he did so rightly, and that it is covered by authority equally binding upon this court.

The leading case upon the subject is Dunlop v. Higgins, 1 H. L. C. 381. It is true that Lord Cottenham might have decided that case without deciding the point raised in this. But it appears to me equally true that he did not do so, and that he preferred to rest, and did rest, his judgment, as to one of the matters of exception before him, upon a principle which embraces and governs the present case. If so, this court is as much bound to apply that principle, constituting, as it did, a *ratio decidendi*, as it is to follow the exact decision itself. The exception was that the lord justice general directed the jury, in point of law, that if the pursuers posted their acceptance of the offer in due time, according to the usage of trade, they were not responsible for any casualties in the post-office establishment. This direction was wide enough in its terms to include the case of the acceptance never being delivered at all; and Lord Cottenham, in expressing his opinion that it was not open to objection, did so after putting the case of a letter containing a notice of dishonor being posted by the holder of a bill of exchange in proper time, in which case he said (at page 399), "Whether that letter be delivered or not is a matter quite immaterial, because for accidents happening at the post office he is not responsible." In short, Lord Cottenham appears to me to have held that, as a rule, a contract formed by correspondence through the post is complete as soon as the letter accepting an offer is put into the post, and is not put an end to in the event of the letter never being delivered. My view of the effect of Dunlop v. Higgins is that taken by Lord Justice James, in Harris' Case, 20 W. R. 690, L. R. 7 Ch. 587, where he speaks of the former case as "a case which is binding upon us, and in which every principle argued before us was discussed at length by the Lord Chancellor in giving judgment;" and adds: "He (meaning the Lord Chancellor) arrived at the conclusion that the posting of the letter of acceptance is the completion of the contract—that is to say, the moment one man has made an offer, and the other has done something binding himself to this offer, then the contract is complete, and neither party can afterwards escape from it." Lord Justice Mellish also took the same view; he says: "In Dunlop v. Higgins the question was directly raised whether the law was truly expounded in the case of Adams v. Lindsell, 1 B. & Ald. 681, and the House of Lords approved the ruling in that case. The Lord Chancellor Cottenham said, in the course

of his judgment, that, in the case of a bill of exchange, notice of dishonor given by putting a letter into the post at the right time, had been held quite sufficient, whether that letter was delivered or not; and he referred to Stocken v. Collin, 7 M. & W. 515, on that point, he being clearly of opinion that the rule as to accepting a contract was exactly the same as to sending notice of dishonor of a bill of exchange. He then referred to the case of Adams v. Lindsell, and quoted the observations of Lord Chief Justice Ellenborough. That case, therefore, appears to me to be a direct decision that the contract is made from the time when it is accepted by post."

Leaving Adams' Case for the moment, I turn to Duncan v. Topham, 8 C. B. 225, in which Mr. Justice Cresswell told the jury that if the letter accepting the contract was put into the post office, and lost by the negligence of the post-office authorities, the contract would nevertheless be complete; and both he and Chief Justice Wilde and Mr. Justice Maule seem to have understood this ruling to have been in accordance with Lord Cottenham's opinion in Dunlop v. Higgins. That opinion, therefore, appears to me to constitute an authority directly binding upon us. But if Dunlop v. Higgins were out of the way, Harris' Case would still go far to govern the present. There it was held that the acceptance of the offer, at all events, binds both parties from the time of the acceptance being posted, and so as to prevent any retractation of the offer being of effect after the acceptance has been posted. Now, whatever in abstract discussion may be said as to the legal notion of its being necessary, in order to the effecting of a valid and binding contract, that the minds of the parties should be brought together at one and the same moment, that notion is practically the foundation of English law upon the subject of the formation of contracts. Unless, therefore, a contract, constituted by correspondence, is absolutely concluded at the moment that the continuing offer is accepted by the person to whom the offer is addressed, it is difficult to see how the two minds are ever to be brought together at one and the same moment. This was pointed out by Lord Ellenborough in the case of Adams v. Lindsell, which is recognized authority upon this branch of the law. But, on the other hand, it is a principle of law, as well established as the legal notion to which I have referred, that the minds of the two parties must be brought together by mutual communication. An acceptance which only remains in the heart of the acceptor, without being actually and by legal implication communicated to the offerer, is no binding acceptance. How, then, are these elements of law to be harmonized in the case of contracts formed by by correspondence through the post? I see no better mode than that of treating the post office as the agent of both parties, and it was so considered by Lord Romilly in Hebb's Case, 15 W. R. 754, L. R. 4 Eq. 9, when, in the course of his judgment, he said: "Dunlop v. Higgins decides that the posting of a letter accepting an offer constitutes a binding contract; but the reason of that is that the post office is the common agent of both parties." Mr. Baron Alderson also, in Stocken v. Collin, a case of notice of dishonor, and the case referred to by Lord Cottenham, says: "If the doctrine that the post office is only the agent for the delivery of the notice were correct, no one could safely avail himself of that mode of transmission." But if the post office be such common agent, then it seems to me to follow that, as soon as the letter of acceptance is delivered to the post office, the contract is made as complete and final, and absolutely binding, as if the acceptor had put his letter into the hands of a messenger sent by the offerer himself as his agent to deliver the offer and receive the acceptance. What other principle can be adopted, short of holding that the contract is not complete by acceptance until and except from the time the letter containing the acceptance is delivered to the offerer—a principle which has been distinctly negatived? This difficulty was attempted to be got over in British and American Telegraph Co. v. Colson, L. R. 6 Ex. 108, 19 W. R. C. L. Dig. 19, which was a case directly on all fours with the present, and in which Chief Baron Kelly is reported to have said: "It may be that in general, though not in all cases, a contract takes effect from the time of acceptance, and not from the subsequent ratification of it. As in the case now before the court, if the letter of allotment had been delivered to the defendant in the due course of the post, he would have become a shareholder from the date of the letter; and to this effect is Potter v. Sanders, 6 Hare, 1. And hence, perhaps, the mistake has arisen that the contract is binding upon both parties at the time when the letter is written and put into the post, although never delivered; whereas, although it may be binding from the time of acceptance, it is only binding at all when afterwards duly ratified." But, with deference, I would ask how a man can be said to be a shareholder at a time before he was bound to take any shares? or, to put the question in the form in which it is put by the Lord Justice Mellish in Harris' Case, how can there be any relation back in a case of this kind, as there may be in bankruptcy? "If," as the Lord Justice said, "the contract after the letter had arrived in time is to be treated as having been made from the time the letter is posted, the reason is that the contract was actually made at the time when the letter was posted." The principle, indeed, laid down in Harris' Case, as well as in Dunlop v. Higgins, can really not be reconciled with the decision in British and American Telegraph Co. v. Colson. Lord Justice James, in the passage I have already quoted from Harris' Case, affirms the proposition that when once the acceptance is posted, neither party can afterwards escape from the contract, and refers with approval to Hebb's Case. There a distinction was taken by the Master of the Rolls that the company chose to send the letter of allotment to their own agent, who was not authorized by the applicant for shares to receive it on his behalf, and who never delivered it, but at the same time assumed that if, instead of sending it through an unauthorized agent, they had sent it through the post-office, the applicant would have been bound, although

the letter had never been delivered. Lord Justice Mellish really goes as far, and states forcibly the reason in favor of this view. The mere suggestion thrown out at the close of his judgment, when stopping short of actually overruling the decision in The British and American Telegraph Company v. Colson, that, although a contract is complete when the letter accepting an offer is posted, yet it may be subject to a condition subsequent that, if the letter does not arrive in due course of post, then the parties may act on the assumption that the offer has not been accepted, can hardly, when contrasted with the rest of his judgment, be said to represent his own opinion on the law upon the subject. The contract, as he says, is actually made when the letter is posted. The acceptor, in posting the letter, has, to use the language of Lord Blackburn in Brogden v. Metropolitan Railway Company, L. R. 2. App. Cas. 666, 691, 26 W. R. Dig. 55, "put it out of his control, and done an extraneous act which clenches the matter, and shows beyond all doubt that each side is bound." How, then, can a casualty in the post, whether resulting in delay, which in commercial transactions is often as bad as no delivery, or in non-delivery, unbind the parties, or unmake the contract? To me it appears that, in practice, a contract complete upon the acceptance of an offer being posted, but liable to be put an end to by an accident in the post, would be more mischievous than a contract only binding upon the parties to it upon the acceptance actually reaching the offerer; and I can see no principle of law from which such an anomalous contract can be deduced. There is no doubt that the implication of a complete, final and absolute binding contract being formed as soon as the acceptance of an offer is posted may, in some cases, lead to inconvenience and hardship. But such there must be, at times, in view of the law. It is impossible in transactions which pass between parties at a distance, and have to be carried on through the medium of correspondence, to adjust conflicting rights between innocent parties, so as to make the consequences of mistake on the part of a mutual agent fall equally upon the shoulders of both. At the same time, I am not prepared to admit that the implication in question will lead to any great or general inconvenience or hardship. An offerer, if he chooses, may always make the formation of the contract which he proposes dependent upon the actual communication to himself of the acceptance. If he trusts to the post, he trusts to a means of communication which, as a rule, does not fail, and, if no answer to his offer is received by him, and the matter is of importance to him, he can make inquiries of the person to whom his offer was addressed. On the other hand, if the contract is not finally concluded, except in the event of the acceptance actually reaching the offerer, the door would be opened to the perpetration of much fraud, and, putting aside this consideration, considerable delay, in commercial transactions, in which dispatch is, as a rule, of the greatest consequence, would be occasioned, for the acceptor would never be entirely safe in acting upon his acceptance until he had received notice that his letter of acceptance had reached its destination.

Upon a balance of conveniences and inconveniences it seems to me, applying with slight alteration the language of the Supreme Court of the United States in Tayloe v. Merchants' Fire Insurance Company, 9 How. (S. C.) 390, more consistent with the acts and declarations of the parties in this case to consider the contract complete and absolutely binding on the transmission of the notice of allotment through the post, as the medium of communication that the parties themselves contemplated, instead of postponing its completion until the notice had been received by the defendant. Upon principle, therefore, as well as authority, I think that the judgment of Mr. Justice Lopes was right and should be affirmed, and that this appeal should therefore be dismissed.

BAGGALLAY, L. J.

I am of opinion that this appeal should be dismissed. It has been established by a series of authorities, including Dunlop v. Higgins in the House of Lords, and Harris' Case in the Court of Appeal in Chancery, that if an offer is made by letter, which expressly or impliedly authorizes the sending of an acceptance of such offer by post, and a letter of acceptance properly addressed is posted in due time, a complete contract is made at the time when the letter of acceptance is posted, though there may be delay in its delivery.

The question involved in the present appeal is whether the same principle should be applied in a case in which the letter of acceptance, though duly posted, is not delivered to the person to whom it is addressed. Mr. Justice Lopes was of opinion that the principle was applicable to such a case, and gave judgment in favor of the plaintiffs, and from such judgment the present appeal is brought.

In support of his appeal, the appellant relies upon the decision of the Court of Exchequer in the case of The British and American Telegraph Company v. Colson, to which, for conciseness, I will refer as Colson's Case.

I propose to consider Dunlop v. Higgins and Colson's and Harris' cases somewhat in detail for the purpose of ascertaining whether the decision of the Court of Exchequer in Colson's Case is consistent with the decisions of the House of Lords and the Lords Justices in the other two cases, and with the principles upon which such decisions were based.

The circumstances of Dunlop v. Higgins were as follows:—After a preliminary correspondence Messrs. Dunlop & Co., who were merchants at Glasgow, addressed a letter on the 28th of January, 1845, to Messrs. Higgins & Co., who carried on business at Liverpool, offering them 2,000 tons of iron pigs at sixty-five shillings per ton net. This letter reached Higgins & Co. by 8 a. m. on the 30th of January, and on the same day they replied by letter, duly addressed to Dunlop & Co., in the following terms:—"We will take the 2,000 tons pigs you offer us." It appeared by the evidence that the first post for Glasgow, after the receipt by Higgins & Co. of the letter of Dunlop & Co., left Liverpool at 3 p. m. on the 30th, and that the post

next following left at 1. a. m. on the 31st, and also that a letter dispatched by the former post would, in due course, arrive at Glasgow at 2 p. m. on the 31st, and by the latter in time to be delivered at 8 a. m. on 1st of February.

The letter so sent by Higgins & Co. was posted after the bags were made up for the 3 p. m. post, and was dispatched by the 1. a. m. post on the 31st; in due course it should have been delivered at Glasgow at 8 a. m. on February 1, but it was not in fact delivered until 2 p. m. on that day, the frosty state of the weather having prevented the train from Liverpool arriving at Warrington in time to meet the down train to Glasgow. It appeared also that Higgins & Co., by mistake, dated their letter as of the 31st of January instead of the 30th. On the 1st of February, after the receipt of the letter of Higgins & Co. accepting the offer, Dunlop & Co. wrote to Higgins & Co.:—"We have your letter of yesterday's date, but are sorry that we cannot now enter the 2,000 tons, our offer of the 28th not being accepted in time." The iron was not delivered, and Higgins & Co. brought their action for breach of contract. The defence of Dunlop was that their letter of the 28th should have been answered by the first post—viz., by that which left Liverpool at 3 p. m. on the 30th; but that at any rate they were not bound to wait for a third post delivered at Glasgow at 2 p. m. of February 1. On the trial before the Lord Justice General he admitted evidence to show that the letter of acceptance, though dated the 31st, was, in fact, written and posted on the 30th of January, and he directed the jury that if Higgins & Co., posted their acceptance of the offer in due time, according to the usage of trade, they were not responsible for any casualties in the post-office establishment.

It is important to bear in mind the terms of this direction, as it formed the substantial subject of appeal, first to the Court of Session, and thence to the House of Lords. The jury found for the plaintiffs; that is to say, they found as a fact that the letter of Higgins & Co. was posted in due time according to the usage of the parties in their business transactions, and, having so found, they, under the direction of the judge, gave their verdict for the plaintiffs. Exceptions were thereupon taken by the defendants, and, among other grounds of exception, they objected to the admission of evidence as to the posting of the letters on the 30th of January, and to the directions of the Lord Justice General, to which I have just referred. The exceptions were overruled by the judges of the First Division, and from their decision the defendants appealed to the House of Lords. The appeal was dismissed, and the ruling and direction of the Lord Justice General was upheld.

Though the question in dispute between the parties was whether Higgins & Co. were responsible for the delay in the delivery of the post, it is observed that the direction of the judge went further, for he ruled that, if the letter was duly posted, they were not responsible for any casualties in the post-office establishment.

During the argument, Lord Cottenham said: "The question is, whether putting in the post is a virtual acceptance, though by the accident of the post it does not arrive;" and, in moving the judgment of the House, he observed: "If a man does all that he can do, that is all that is called for; if there is a usage of trade to accept such an offer, and to forward it by means of the post, and if the party accepting the offer puts his letter into the post on the correct day, has he not done everything that he was bound to do? How can he be responsible for that over which he has no control?"

There is nothing in the language thus used by Lord Cottenham to suggest any distinction between a case in which there is delay in the delivery of the letter and one in which the letter is not delivered at all. But Lord Cottenham went on to illustrate his meaning, and did so in the following terms: "It is a very frequent occurrence that a party having a bill of exchange which he tenders for payment to the acceptor and acceptance is refused, is bound to give the earliest notice to the drawer. That person may be resident many miles distant from him. If he puts a letter into the post at the right time, it has been held quite sufficient; he has put the letter into the post, and whether that letter be delivered or not is a matter quite immaterial, because for accidents happening at the post-office he is not responsible."

Having regard to these passages in Lord Cottenham's judgment, it appears to me impossible to doubt that the proposition which he intended to affirm and which was, in fact, his *ratio decidendi*, was this, that when the letter accepting the offer was duly posted, the contract was complete, although it might be delayed in its delivery, or might never reach the hands of the party making the offer.

I desire, however, to guard myself against being considered as participating in a view of the effect of the decision in Dunlop v. Higgins which has been sometimes adopted, and, as I think, without sufficient reason—viz., that in all cases in which an offer is accepted by a letter addressed to the party making the offer and duly posted, there is a binding contract from the time when such letter was posted. I do not take this view of the effect of the decision in Dunlop v. Higgins; on the contrary, I think that the principle established by that case is limited in its application to cases in which by reason of general usage, or of the relation between the parties to any particular transaction, or of the terms in which the offer is made, the acceptance of such offer by a letter through the post is expressly or impliedly authorized.

In Dunlop v. Higgins, the previous correspondence between the two firms was, in my opinion, quite sufficient, not only to authorize the sending of the acceptance by post, but to point to it as the only mode in which, under the circumstances, such acceptance could be communicated; and it was in consequence of the jury finding as a fact that Higgins & Co. posted their acceptance of the offer of Dunlop & Co. in due time, according to the usage of their business transactions, that they found a verdict for the plaintiff under the direction of the judge.

The principle involved in Dunlop v. Higgins was

recognized by Mr. Justice Cresswell upon the trial of the action in Duncan v. Topham. Upon that occasion he directed the jury that if the letter accepting the contract was put into the post-office, and lost through the negligence of the post-office authorities, the contract would, nevertheless, be complete; and, upon an application in the same case to make absolute a rule *nisi* which had been obtained for a new trial, though the new trial was ordered upon other grounds, Chief Justice Wilde and Mr. Justice Maule expressed views to the same effect as the direction of Mr. Justice Cresswell. In that case the letter never reached the hands of the person to whom it was addressed.

I proceed to consider the circumstances of Colson's Case. They were as follows: On the 13th of February, 1867, the defendant sent an application to the company, through the post, for an allotment of fifty shares, undertaking by his letter to pay the sum of £2 per share on whatever number should be allotted to him. On the 14th of the same month fifty shares were allotted to him, and a letter informing him of such allotment was posted to his address, as given in his letter of application for shares—viz. 31 Charlotte street, Fitzroy square.

Now, a letter of application for shares in a public company, expressed in the usual form, must, I think, having regard to the usage in such matters, be considered as authorizing the acceptance of the offer by a letter through the post; as was expressed by Mr. Justice Lopes in this case now under consideration, such would be the ordinary mode of transmission of an allotment letter. The defendant, however, swore, and there was no reason to doubt the truth of his statement, that he never received the letter of allotment; that another person of the same name lived opposite to him in the same street; that about that time the numbers in the street were changed, his own being altered from 31 to 87, and that several letters then sent to him had never reached him. On the 28th of February, the plaintiffs, on being informed that the letter of allotment had not reached the defendant, sent him a duplicate, which he refused to accept; the action was then brought by the company to recover the £2 per share; the jury found that the letter of allotment was posted to the defendant on the 14th of February, but that he never received it, and that the second notice was not sent in reasonable time; the learned judge, Mr. Baron Bramwell, thereupon directed the verdict to be entered for the plaintiffs, but gave the defendant leave to move to have it entered for himself, on the authority of Finucane's Case, 17 W. R. 813, which had then been recently decided by Lord Romilly. A rule *nisi* was accordingly obtained, and cause was shown on the 17th of November, 1870, the court being composed of the Lord Chief Baron and Barons Bramwell and Piggott; judgment was reserved, and, on the 31st of January, 1871, the rule was made absolute to enter the verdict for the defendant. The Lord Chief Baron, in the course of his judgment expressed himself as follows: "It appears to me that if one proposes to another by a letter through the post, to enter into a contract for the sale or purchase of goods, or, as in this case, of shares in a company, and the proposal is accepted by letter and the letter put into the post, the party having proposed to contract is not bound by the acceptance of it until the letter of acceptance is delivered to him or otherwise brought to his knowledge, except in certain cases where the non-receipt of the acceptance has been occasioned by his own act or default."

Now, unless the proposition so put forward by the Lord Chief Baron is to be read with some qualification, it can hardly be considered as consistent with the decision in Dunlop v. Higgins, as such decision has been ordinarily understood. The view, however, taken by him of that decision does not appear to be in accordance with that generally taken; for, after alluding to the circumstances of Dunlop v. Higgins, he proceeded to express his entire concurrence in the decision of the Court of Session, and in the affirmance of it by the House of Lords, upon the ground that in his opinion the acceptance of the offer reached Dunlop & Co. in time, and that the House of Lords had acted upon the same view of the circumstances of the case. The distinction which he recognized between that case and the one then under consideration consisted in this: that, whereas the letter of acceptance in Dunlop v. Higgins was received by the party making the offer in due time, that in Colson's Case never reached its destination. Mr. Baron Piggott did not deliver a separate judgment, but it was stated that he concurred in that of the Lord Chief Baron. Mr. Baron Bramwell also commented upon the circumstances of Dunlop v. Higgins, and referred to several passages in the judgment of Lord Cottenham, including those which I have quoted, and he then expressed himself as follows:—"It seems to me that the correct way to deal with these expressions is to refer them to the subject-matter, and not to consider them as laying down such a proposition as the plaintiffs have contended for, but that when the post may be used between two parties, it must be subject to those delays which are unavoidable." It would appear, then, that all the learned judges in the Court of Exchequer treated the case of Dunlop v. Higgins as one decided upon its special circumstances, and as not enunciating any general principle beyond what was necessary for dealing with such circumstances.

I am unable to concur in this view. It may be that there were special circumstances in Dunlop v. Higgins sufficient to have justified the decision of the House of Lords, irrespective of the application of the principle involved in the direction of the Lord Justice General; but the decision was not expressed to be based, and apparently was not intended to be based, upon any such ground, but upon an approval and adoption of the direction of that learned judge.

After a careful consideration of the judgments of the Lord Chief Baron and Mr. Baron Bramwell, I can come to no other conclusion than that the decision in Colson's Case is inconsistent with that of the House of Lords in Dunlop v. Higgins. If I am right in this conclusion, it is not for me to

choose between the two. I am bound by the authority of the decision of the House of Lords.

But I pass on to consider the circumstances of Harris' Case, which came before the Lords Justices in 1872. On the 8th of March, 1866, Lewis Harris of Dublin, applied to the directors of the Imperial Land Company of Marseilles, by a letter in the usual form, for an allotment of 200 shares, undertaking by his letter to accept that, or any less number of shares that might be allotted to him. The directors allotted to him 100 shares, and, early on the morning of March 16, posted a letter to him, at his address as given in his letter of application, which was received by him at Dublin. He had, however, in the interval between the posting and the delivery of the letter giving him notice of the allotment, written to the directors withdrawing his application and declining to accept any shares. Upon an order being made to wind up the company, Mr. Harris was placed upon the list of contributories in respect of the 100 shares, and a summons having been taken out by him to have his name removed from the list, such summons was dismissed by Vice-Chancellor Malins. From such dismissal Mr. Harris appealed, but the decision of the vice-chancellor was upheld. In giving judgment Lord Justice James said that it appeared to him that the contract was completed the moment the notice of allotment was committed to the post; and a similar view was expressed by Lord Justice Mellish, who, after referring to the decision in the Court of Exchequer in Colson's Case, and stating that he had great difficulty in reconciling it with that of the House of Lords in Dunlop v. Higgins, observed, with reference to the last mentioned case, that the real question then before the House of Lords was whether the ruling of the Lord Justice General was correct, and that the House of Lords held that it was.

It is doubtless true, as was observed by both the Lords Justices, that the decision in Harris' Case was not necessarily inconsistent with that of the Court of Exchequer in Colson's Case; but it is, I think, clear that, although the Lords Justices did not feel themselves called upon to express any dissent from the decision of the Court of Exchequer, as it was not necessary for the decision of the case before them that they should do so, they by no means recognized the propriety of the distinction drawn by the Court of Exchequer between Dunlop v. Higgins and Colson's case.

I do not think it necessary to refer to Finucane's Case and other cases decided by Lord Romilly, in which he held that the posting of a letter of allotment which never reached its destination was not sufficient to constitute the applicant a contributory, further than to observe that, in Finucane's Case, Dunlop v. Higgins and Duncan v. Topham were not cited, and that in the others the circumstances were such that the Master of the Rolls deemed himself justified in not following the decision in Dunlop v. Higgins. Indeed, in one of these cases, Hebb' Csase, he distinctly recognized the authority of the decision in Dunlop v. Higgins, which he considered to have been decided upon the ground that the post office was the common agent of both parties.

For the reasons which I have assigned, I am of opinion that the principle established by the decision of the House of Lords in Dunlop v. Higgins, is applicable to the case now under consideration, and that the decision of Mr. Justice Lopes should be affirmed. I desire, however, to add that, whilst I have felt myself bound by authority, my own convictions are entirely in accordance with the principles which I consider to have been established by authority; and in saying this, I bear in mind, as well the very forcible remarks made by the Lord Chief Baron and my present colleague upon the subject of the mischievous consequence that might ensue from an adoption of these principles in certain suggested cases, as the equally forcible remarks made by Lord Justice Mellish as to the like consequences which would ensue in other cases if these principles were departed from.

BRAMWELL, L. J., dissented.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF MICHIGAN.

June Term, 1879.

REAL ESTATE AGENCY NOT A PROFESSIONAL EMPLOYMENT.—A private agency is not an "office" or a "professional employment," and real estate agencies are no more professions than any other business agencies. Therefore, a real estate agent who has appropriated the proceeds of land that he has sold for another, can not be arrested on a *capias* issued under Comp. L. 1871, § 5734, which applies only to cases of contract liability incurred or complicated through "some misconduct or neglect in office, or in some professional employment." Bronson v. Newbury, 2 Doug. (Mich.) 38; People v. McAllister, 19 Mich. 215. Opinion by CAMPBELL, C. J.—*Pennock v. Fuller.*

WAGES OF VESSEL AND CREW RECOVERABLE UNDER COMMON COUNTS, WHERE SPECIAL CONTRACT LIES UNPERFORMED.— Defendant having hired of plaintiffs their vessel and crew to go from Detroit to Sandusky, and there take on a load of coal, to be carried to Little Traverse for one dollar per ton, free in and out, they immediately sent the vessel to Sandusky, but the cargo intended for her was taken up by another, and defendant not furnishing the agreed freight and the vessel being unable to obtain it, she was brought back to Detroit, having consumed in the trip three and a half days, including Sunday. *Held*, that under the common counts it was admissible for plaintiff to show that the schooner and crew separately had a market value by the day, and to show the usual price for both and for captain and crew, including board. The case is within the scope of the common counts for labor and service. Plaintiffs entered upon performance and proceeded as far as they could go without the co-operation required of defendant by the contract. His conduct authorized them to rescind it, and they did so. *Indebitatus assumpsit* lies while the special contract remains unperformed. No recovery was sought for constructive service, or for damages as such. There was no deviation from the agreed course in going to Sandusky and coming back as far as Detroit. The wages earned were recoverable under the common counts. Cutter v. Powell, 2

Smith, L. C.; Plancke v. Colburn, 8 Bing. 14; Hokgland v. Moore, 2 Blackf. 167; Dubois v. Delaware, etc. Canal Co., 4 Wend. 285; Moulten v. Trask, 9 Met. 577. Opinion by GRAVES, J.—*Mitchell v. Scott.*

CONDITIONAL ORDER FOR NEW TRIAL—REMOVAL OF CAUSES—MANDAMUS—INJUNCTION FROM UNITED STATES COURT.— Relators had been sued in the Superior Court of Detroit in trover for the conversion of goods, which they claimed were seized by the United States marshal, one of the defendants, under a provisional warrant in bankruptcy. Judgment was rendered against them, and application was made for a new trial, the principal ground being that one of their counsel had been misled concerning the probability of a jury trial. They had proposed to remove the case to the United States court, but the trial came on before they completed their steps. *Held*, 1. That as by the Constitution a jury trial is, in civil cases, deemed waived, unless seasonably demanded, defendants knew they had no right to one. The affidavits used before the deceased judge of the superior court on the motion for a new trial (and nothing further can be used here to show the propriety of the disposal), show that the judge had made no suggestion that he would not try the case himself. 2. The application for a new trial not being a matter of right, it was legal and proper for the court to impose conditions, particularly that the parties should waive any supposed right of removal, and should try the case at the next term. The judgment remained in force subject to the conditions imposed, and could only be absolutely vacated when those were performed. 3. When relators violated the conditions by filing a bill in the United States court and obtaining an injunction against further proceedings in the superior court, the conditional order for a new trial was properly revoked. 4. A *mandamus* can not be granted, because this court has no power to review the discretionary actions of courts in such cases; and the writ not being of right is not allowed where the parties have been culpably dilatory. 5. The act of filing in the superior court an injunction from the United States Circuit Court was improper and offensive, and could have no operation in a suit in the State court. The United States Circuit Court can not exercise revisory powers over a State judgment in this way, nor is such power supposed to be asserted. Opinion by CAMPBELL, C. J. — *People v. Judge of Superior Court of Detroit.*

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

July, 1879.

BETTERMENT LAWS — AUTHORITY OF TOWN TO ARBITRATE.—Where a way is laid out under the betterment laws, it is the duty of the board of street commissioners or of aldermen in cities and of selectmen in towns, to determine what real estate has received special benefit from the laying out and to assess upon such estate a proportional share of the expense. This assessment is in the nature of a tax, which must be laid proportionally upon all the estates which are specially benefitted. In laying it, the said boards act, not as agents of the city or town, but as public officers in a *quasi* judicial character; and they are not subject to the direction or control of the city or town. A city can not therefore agree with an owner of real estate to submit to arbitration the question of the amount due from his estate as betterments. Opinion by MORTON, J.—*Somerville v. Dickerman.*

VOLUNTARY PAYMENT — AGENCY—INTERLOCUTORY DECREE.—1. Where the plaintiff has voluntarily and without any fraud, misrepresentation or concealment, paid to the defendants, as agents of a life insurance company, the annual premiums due on a policy issued by that corporation to the plaintiff, he can not recover back the amount thus paid in an action where the only ground alleged for the liability of the defendants is that at the time of the payments they were not the agents of said corporation authorized to receive premiums. 2. An interlocutory decree of court placing said corporation in the hands of a receiver, "with power to collect and get in all debts now due and outstanding to said company, and collect all rents and other issues of property as they become due, and safely keep the same until the further order of the court in this case, and with power also to said receiver to continue the business of said corporation in the receipt of premiums and the payment of the necessary expenses of the business," etc., does not revoke the authority of the agents of the corporation, but contemplates that they are to continue as agents accountable to the receiver. Opinion by MORTON, J.—*Rice v. Barnard.*

INDICTMENT—CONVEYING INCUMBERED REAL ESTATE—VARIANCE.—Upon an indictment, under the statute, charging the defendant with conveying in mortgage incumbered real estate without disclosing the incumbrance, where the allegation is that the grantee "then and there did pay to said Williams for said conveyance a valuable considcration, to wit, the sum of one hundred and forty-eight dollars and ninety-eight cents," and it appears that a suit had been brought by the grantee upon which the defendant was arrested, and that the mortgage in question and a note secured thereby were given to pay the debt sued on and the costs of suit; and upon giving said note and mortgage the defendant was discharged from arrest, it was *held*, that the variance was fatal. Opinion by LORD, J.—*Com. v. Williams.*

CRIMINAL LAW—CONVEYING INCUMBERED REAL ESTATE—EVIDENCE.—On the trial of an indictment, under the statute, charging the defendant with conveying by deed of warranty incumbered real estate without disclosing the incumbrance, the government offered in evidence a deed from the defendant to one Joice dated May 4, 1875, and recorded May 12, 1875, and introduced evidence tending to show the payment of the consideration by said Joice and his ignorance of the incumbrance, in proof of which the governmrnt offered in evidence a mortgage deed, including the land described in the Joice deed, from the defendant to one Tuttle, dated May 2, 1873, but not recorded until May 26, 1876, and the note secured thereby. The defendant offered to prove "that prior to the conveyance to Joice, the defendant had an oral agreement from Tuttle that he might convey this piece of land to Joice, he, the defendant, paying over to Tuttle the proceeds thereof, Tuttle at the same time informing the defendant that his mortgage was not recorded; that subsequently on receiving the purchase money for the land the defendant paid over the same to Tuttle in accordanee with said agreement." The court excluded this evidence, the defendant's counsel not offering to show that Joice had any notice or knowledge of the foregoing facts, *Held*, that the evidence should have been admitted. It would tend to show that the rights of neither could be prejudiced by the conveyance; not those of Tuttle, for the conveyance was with his knowledge and consent, for his benefit, and he received the purchase money; not those of Joice, for neither in law nor in equity was the deed to Tuttle an incumbrance upon the estate conveyed to him. Opinion by LORD, J.—*Com. v. Harriman.*

SUPREME COURT OF ILLINOIS.

[Filed at Ottawa, June 21, 1879.]

PRACTICE — APPEALS— NEW TRIAL CAN NOT BE GRANTED AFTER TWO TRIALS, UNLESS ERROR OF LAW COMMITTED.—This case was previously before the Supreme Court, and the judgment of the court below was reversed, and the cause remanded. The case was again tried, resulting in another verdict in favor of plaintiff. and defendant has again appealed. When the case was formerly before this court the judgment was reversed, because the evidence was not sufficient to authorize a recovery. On turning to the evidence in the record the court finds that appellee has in nowise strengthened his, and that appellant has strengthened his. Hence, the judgment below must be reversed. But it is urged by appellee that there have been two new trials granted in this case, and under the practice act another can not be granted. It is claimed that as the circuit court granted one new trial, and this court reversed the judgment of the circuit court rendered in a subsequent trial, and as that gave appellant a new trial, that these constitute "two new trials," within the meaning of the statute. And for that reason this court can not reverse, because that would be to grant three new trials, and cases are referred to decided by the Supreme Court of Indiana. WALKER, J.: "This question was before us in the case of 26 Ill. 291, under the former statute. It was then said: 'Although there might be a case where this court would set aside a third verdict as being without evidence to support it, or for gross misdirection of the court as to the law, we do not think this is such a case.' In the case of 53 Ill. 479, the question was again before us, and it was said that it is eminently proper that where three juries have found the facts the same way, that there should be an end to the controversy; but it was also said the same reason does not apply to the granting of new trials, because errors in law have been committed. The 23d of appellant's instructions is clearly correct, and the court below erred in refusing to give it to the jury. For this error of law the judgment is reversed."—*Illinois Cent. R. Co. v. Patterson.*

INSURANCE—WHETHER STREET BROKER IS AGENT OF THE ASSURED — PAYMENT OF PREMIUM TO BROKER—CHALLENGING JURORS.—This was an action brought by Elizabeth Ward against the Lycoming Fire Insurance Company, on a policy of insurance, executed by the defendant to the plaintiff on the 24th day of April, 1874, insuring the property of the plaintiff. On the trial before a jury, the plaintiff recovered a verdict and judgment, to reverse which the defendant appeals. The first error complained of is the decision of the court in overruling defendant's challenge to five persons as jurors. These jurors were on the regular panel, but they had heard a part of the evidence given in a case which had first been tried in the court between the same plaintiff against the German Ins. Co., where the questions involved were similar to those in the present case. The policy sued on contained conditions to the effect that "any person other than the assured who may have procured the insurance shall be deemed to be the agent of the assured," and that the company was not liable on the policy until the premium thereon was paid. The premium had never been received by the company, and it contends that the policy was void, while the plaintiff claims she paid the premium to one P, with whom she contracted for the insurance. P was at the time an insurance broker. CRAIG, C. J., says: "If a juror has made up a decided opinion on the merits of the case, either from a personal knowledge of the facts, or other causes, and that opinion is positive and not hypothetical, and such as will probably prevent him from giving an impartial verdict, as held in 3 Scam. 76, the challenge would be well taken, and should be allowed. But these jurors had no fixed or decided opinion in the case, if they had any opinion whatever from what they had learned. * * * * The plaintiff accepted the policy, paid the premium in good faith under the belief that P was the agent of the company. Under such circumstances, who should bear the loss arising from the fraud committed by the street broker; should it fall upon the plaintiff who was an innocent party in the transaction, or should it fall upon the company who alone enabled P to successfully consummate the contract of insurance by placing in his hands the policy for delivery. P was not the agent of the plaintiff, and while he may not have been in fact the agent of the company, still the company by placing the policy in his hands is estopped from claiming that the payment made to him upon the delivery of the policy is not binding upon the company." Affirmed. —*Lycoming Ins. Co. v. Ward.*

MECHANIC'S LIEN — TIME OF PERFORMANCE OF CONTRACT—PAROL EVIDENCE—IMPLIED CONTRACT. —This was a petition for a mechanic's lien upon certain buildings described, alleging that plaintiff entered into a written contract with defendants, owners in fee simple of the real estate described, wherein they agreed to furnish certain building materials to be used in the erection of certain buildings, at a certain price to be paid, and that in pursuance thereof the materials mentioned were duly furnished, and that at the time of making the contract it was verbally agreed by them that the work and materials mentioned in the written agreement were to be furnished on or before July 1st, 1875. The case was referred to a master, who reported that plaintiff was not entitled to a lien, for the reason that no time was specified in the written contract, within which the materials were to be furnished. Exceptions were filed to the master's report, which the lower court overruled, and plaintiff appeals. SCHOLFIELD, J., says: "The doctrine is too well settled to require discussion that parol evidence was inadmissible to fix the time when the contract was to be performed. A contract can not rest partly in writing and partly in parol. But it results by legal implication from the the terms of the contract that the performance is to be within a reasonable time. The question is, therefore, does the fact that the contract was only to be performed within a reasonable time preclude the enforcement of a mechanic's lien upon it? This question is settled in the negative by Clark v. Manning, at the present term, and Orr v. N. W. etc. Ins. Co,, 86 Ill. 260. In the first of these cases, no time was mentioned in which the work was to be completed. And it was held, overruling previous cases in conflict with that construction, that under the act of 1861, a mechanic may have a lien provided the work is done or materials furnished within one year from the time of the commencement of the work, although no time for performance is mentioned in the contract. The other case, like the present, arose under the Rev. Stats. of 1874. We held that the contract was either an implied one, or one partly implied and partly expressed, and that in either event it was not affected by the limitation of the statute. In this case, the time of performance of the contract is implied. The balance is expressed. It is therefore in the language of the first section of the chapter on Liens, partly expressed and partly implied, and so a lien is given. And since the implied part of the contract is to be governed by that part of the statutes relating to implied liens (Orr v, N. W. etc. Ins. Co., *supra*), it follows that, under the 3d section, it is only necessary that this work shall be done within one year from the commencement of the work, which the

proof here shows was done. The court therefore erred in not sustaining the exceptions to the master's report." Reversed.—*Driver v. Ford.*

SUPREME COURT OF MINNESOTA.

August-September, 1879.

RETURN OF SERVICE — PRESUMPTION.— The following properly signed indorsement upon a summons is a sufficient return of sufficient service, to wit: "I hereby certify and return that, at the town of St. Augusta, in said county and State, on the 7th day of November, 1877, I served the within summons upon the within named defendant, Jacob Woll, by leaving a true and certified copy at his usual place of abode, with his wife, she bring a suitable person and of age and discretion, and then a resident therein; and further that the person so served, as aforesaid, is the identical person named as defendant herein." Where a public officer is required to perform a ministerial duty in one or two ways, according to circumstances, and he performs it in one of them, the general presumption that officers of that kind do their duty, operates as a presumption that the mode of performance was that which the circumstances authorized. Opinion by BERRY, J.—*Goener v. Woll.*

WRIT OF PROHIBITION.—In an action proceeding in the ordinary way, the cause of action being within the jurisdiction of the court, if in the course of the action any matter arises or is presented to the court requiring it to decide upon its jurisdiction, an error in such decision must be corrected on appeal, writ of error, or *certiorari*, if such mode of review is open to the party. In such case the writ of prohibition is not the proper remedy. Opinion by GILFILLAN, C. J.—*State v. Municipal Court of St. Paul.*

NOTE—FAILURE OF CONSIDERATION.—Where the maker of a promissory note, as a defense to the same, relies upon a partial failure of the consideration, the burden is upon him to show to what extent, *i. e.*, to what value consideration has failed. In this case, the court assumes, for the benefit of the defendant, that the consideration of the note upon which the action is brought is apportionable, and that a partial failure of the consideration of a promissory note is available as a defense in this State. Upon this assumption it is *held*, that the defendants having failed to make it appear to what extent the consideration had failed in proportion to the whole consideration, the plaintiff is entitled to recover the full face of the note. Opinion by BERRY, J.—*Bisbee v. Torinus.*

SUPREME COURT OF MISSOURI.

April Term, 1879.

CIVIL PRACTICE—WHEN AMENDED PETITION ALLOWED. — The original petition set forth an action *ex contractu* on a bond of indemnity given to the sheriff by the execution creditor, to save him harmless if he levied on the property which L, the relator, claimed. The amended petition, filed after demurrer sustained, was for simple trespass for taking and carrying away L's goods. *Held*, that notwithstanding § 7, Wag. Stat., p. 1035, which provides "that a petition or answer may be amended by the proper party of course without costs and without prejudice to the proceeding already had, at any time before the answer or reply thereto shall be filed," the amendment could not be made. Section 7, *supra*, does not permit an amendment which could not have been made at common law, latter having permitted amendments by adding additional counts, provided the new counts were substantially the same cause of action. To permit the amendment contended for would sanction the substitution of an action *ex delicto* for one *ex contractu*, which section 7, by a liberal and reasonable construction, does not authorize. 5 Wis. 117; 35 Penn. St. 26. Opinion by HENRY, J.—*Lumpkin v. Collier.*

DEFECT IN SIDEWALK MADE BY ADJOINING OWNERS —WHEN CITY LIABLE THEREFOR— DUTY OF CITY REGARDING STREETS AND SIDEWALKS. — Plaintiff was injured in consequence of a defect in sidewalk of a street in Kansas City in December, 1873. The testimony showed that the street was in public use, and was one of the principal thoroughfares of the city at the time of the accident, and prior thereto had been graded for vehicles, though no side track had been constructed by the city; but the property owners had placed along it, on the side on which plaintiff was passing, a plank walk, and he was permanently injured, in the night time, in consequence of the improper manner in which said plank walk was constructed. The city engineer knew of the condition of the street, and in 1873, previous to the accident, the city council had passed several ordinances providing for the grading of the sidewalk and for building a plank sidewalk. One of the ordinances recited that the city deemed it necessary to have the work done, and allowed the property owners twenty days within which to do it, otherwise it should be paid for by special tax bill against the property. It was contended by the city that as the walk by which plaintiff was injured was not built by the city, nor in pursuance of its requirement, but was built by the owners of adjacent property, the city could not be held liable for a defect therein until some work had been done on it by the city, and that such work had to be in pursuance of an ordinance. *Held*, that the sidewalk is that part of the street set apart for the use of pedestrians, and is as much under the control of the city as that portion set apart for vehicles; that it is the duty of the city, whenever a street is required for public use, to put and maintain the same in a reasonably safe condition for travel for pedestrians as well as for vehicles, and it is liable for injuries resulting from neglect of this duty, and if the street is rendered unsafe for travel by obstructions or unauthorized structures placed within the limits which have been opened by proprietors or others, and the city has notice and fails to remove or repair the same, it is liable for the resulting injury (Dillon on Mun. Corp., § § 789, 790 and 791), and the liability attaches to the city whether it adopts the necessary legislation or not. Affirmed. Opinion by HOUGH, J.—*Oliver v. Kansas City.*

EVIDENCE — WHEN DECLARATIONS OF PARTY OFFERED IN EVIDENCE BY OPPOSITE PARTY NOT EVIDENCE FOR THE FORMER. — To an action on a policy of insurance issued by defendant on a dwelling and some wine and vinegar stored therein, it was pleaded, first, that the plaintiff, at the time he procured the policy, fraudulently placed an over valuation upon the property insured, and, second, that he placed a like over valuation on the property in the affidavit and statement furnished after the fire, as an account and proof of loss, for the purpose of obtaining the amount sworn to in such statement. Plaintiff introduced evidence tending to show the value of the property to be as alleged by him on procuring the policy, and as alleged in his statement after the loss. The evidence for the defendant tended to prove the property to be of considerable less value than placed on it by plaintiff, and to further sustain that defense the defendant also introduced in evidence the state-

ment and proof of loss made by plaintiff to show that the latter had over valued the property. The defendant asked the court to instruct the jury that the affidavit and account and proof of loss furnished to the defendant by plaintiff and read in evidence by defendant should be considered by the jury as evidence of the fact only that they were so delivered to defendant, and not as evidence proving, or tending to prove, the amount of plaintiff's loss, which the court refused to give. *Held*, that the principle that when the declarations of a party are introduced in evidence by the opposite party, they are to be considered by the jury as evidence as well for the party making as for the party offering them, has no application in this case, and the court erred in refusing the instruction. Reversed. Opinion by HENRY, J.—*Brown v. Clay Fire & Marine Ins. Co.*

QUERIES AND ANSWERS.

[The attention of subscribers is directed to this department, as a means of mutual benefit. Answers to queries will be thankfully received, and due credit given whenever requested. The queries must be brief; long statements of facts of particular cases must, for want of space, be invariably rejected. Anonymous communications are not requested.]

*** The following queries received during the past week are respectfully submitted to our subscribers for solution, by request of the senders. It is particularly desired that any of our readers who have had similar cases, or have investigated the principles on which they depend, will take the trouble to forward an answer to as many of them as they are able.*

QUERIES.

30. A CORPORATION ISSUES BONDS to the amount of $50,000, secured by an ordinary mortgage to trustees. An individual bondholder obtains a judgment at law on several of the bonds, issues execution, and the property is sold. Does the purchaser take the premises discharged of the mortgage, or does he purchase the mere equity of redemption? The judgment is against corporation only, the trustees are not parties to the suit. B.

ANSWERS.

No. 25.

[9 Cent. L. J. 329.]

When the wife of A accepted the deed from B her inchoate right of dower was thereby merged in the fee. G.

The inchoate right of dower of the wife of A would not be affected in the least. The mortgage given was merely security for the payment of the debt, and if it was discharged the land would be freed from its operation. If the debt was realized by resort to the mortgage, such proceedings could not operate against the inchoate right of dower of the wife of A, because she was not a party to the mortgage, and could not be concluded except by her own act. C.

Where A took a conveyance of land subject to a mortgage of B, but did not assume its payment, and afterwards promised to pay the interest in default on condition that further delay should be granted: *Held*, that the promise was on a valid consideration, and was not a promise to answer for the debt of another.—*Prime v. Kohler.* Court of Appeals of New York.

NOTES.

HENRY GREEN, of Easton, has been appointed an associate justice of the Supreme Court of Pennsylvania, *vice* Judge Woodward deceased.——The annual session of the Institut de Droit International will be held this year in Brussels, and will be opened on November 1. Among the subjects to be discussed are: The Conflict of Civil and Penal Laws; Tho Regulations of the Laws and Customs of War; The Application to the Eastern Nations of the Common Law of Europe, and The International Protection of Submarine Telegraph Cables.——England has also been shocked by a blundering execution. The long fall is a failure. The old gallows killed much more mercifully. The British press is discussing the question with all the more vigor, because by an order of the Home Office the representatives of the press are hereafter to be excluded from executions.

The next term of the Supreme Court of the United States commences on the 13th of October. Justices Miller and Strong are already in Washington. The first day, says the *Law Register* of that city, the court will merely meet and adjourn, and then pay its respects to the President. On the second day, the docket will be called, beginning with number one. There are 821 cases on the docket. On the same day, by special assignment, there will be taken up for hearing the celebrated Virginia case, involving the right of colored men to be tried by juries of their own color. As is known, this case presents most important features, involving the constitutionality of the reconstruction legislation of Congress. There will be quite an array of legal talent in the case, as among those who will argue it will be the Attorney-General of the United States and the Attorney-General of Virginia. Mr. Justice Strong has set for a hearing on the same day before the full bench the case of the Ohio election judge, involving the constitutionality of the election laws of Congress, and the Chief Justice has also set the 14th of this month for the hearing of the *habeas corpus* cases of the Maryland election judges. —— The disastrous results of the failure of the Glasgow Bank have given rise, says the *Canada Law Journal*, to a bill which has been favorably received by the Imperial Parliament, and appears likely to pass into law in England. This bill alters the position of unlimited joint-stock banks. It enables the shareholders of such a bank to limit their liability, should they so desire. At the same time, unlimited banks are not obliged to come under its operation; if they think it more to their advantage to remain unlimited, and if the shareholders are willing to face the risks. In the words of the *Saturday Review*:—"An unlimited Bank will be able to register itself as a limited bank, and it may, of course, choose any kind of limitation it pleases. It may have half or a third only of its capital paid up, and then, in case of liquidation, the uncalled capital will be payable for the benefit of creditors. But unlimited banks that seek to limit their liability will, under the bill, have another course open to them. They will be able to register as banks with reserved liability or limited reserve. In case of disaster, the shareholders will be liable not only for the amount of their shares, but for a further sum, which is always to be a multiple of the amount of each share they hold. Every bank may choose what this multiple shall be. Some banks will choose to multiply by one, and then the reserve liability will be equal to the amount of the share. Others will multiply by two, and then the reserve will be equal to twice the amount of the share."